

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANITA ACOSTA

Claimant

VS.

RIVERSIDE HOSPITAL

Respondent

AND

PHICO INSURANCE COMPANY

Insurance Carrier

Docket No. 217,942

ORDER

Respondent and its insurance carrier requested review of the Award dated June 23, 1998, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument in Wichita, Kansas, on January 8, 1999.

APPEARANCES

James R. Roth of Wichita, Kansas, appeared for the claimant. Scott J. Mann of Hutchinson, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the record includes the testimony and exhibits introduced at claimant's deposition, which was taken on May 14, 1998. Also, at oral argument before the Appeals Board, the parties stipulated that claimant's average weekly wage was \$298.21, excluding fringe benefits, and \$317.15, including fringe benefits. Additionally, the parties stipulated that claimant's fringe benefits continued through February 27, 1998.

ISSUES

This is a claim for a January 10, 1996 accident. After finding that claimant had made a good faith effort to find employment, the Judge averaged a 40 percent work task loss with a 100 percent wage loss and awarded claimant a 70 percent permanent partial general disability.

Respondent and its insurance carrier contend the Judge erred. They contend (1) claimant has not made a good faith effort to find appropriate employment, (2) that claimant retains the ability to earn a wage comparable to what she was earning on the date of accident, and, therefore, (3) claimant's permanent partial general disability should be limited to the six percent functional impairment rating. At oral argument before the Appeals Board, respondent and its insurance carrier abandoned the contention that claimant had a preexisting impairment that should be deducted from the award of compensation.

The only issue before the Board on this appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

- (1) Ms. Acosta worked for Riverside Hospital as a certified nurses aide. On January 10, 1996, she injured her neck while helping a co-worker lift a patient into bed. Shortly after the incident, Ms. Acosta experienced left arm and shoulder symptoms. The parties stipulated that the accident arose out of and in the course of employment.
- (2) After being off work for several weeks, Ms. Acosta initially returned to work with light duty restrictions. Between the date of accident and her last day worked for Riverside Hospital in November 1996, Ms. Acosta worked sporadically.
- (3) Ms. Acosta's treating physician released her to return to work in November 1996. When she found that she could not perform the work, the doctor ordered more treatment. After additional physical therapy and a second functional capacity evaluation, the doctor again released Ms. Acosta to return to work in early March 1997.
- (4) After the March 1997 release, Riverside Hospital did not return Ms. Acosta to work.
- (5) When she last testified in May 1998, Ms. Acosta had contacted approximately six potential employers. She attributes some of her limited effort to find employment to ignorance of her permanent work restrictions. But in the year and two months that transpired between the March 1997 release and her May 1998 testimony, she attempted to contact her doctor on only one occasion to clarify her restrictions.

(6) Since her release in March 1997, Ms Acosta has made flower arrangements to sell on consignment and has helped without pay in her husband's taco restaurant. Additionally, on at least one occasion she performed some housecleaning duties and earned a minimal amount.

(7) When she last testified in May 1998, Ms. Acosta remained unemployed. She was making and selling two or three flower arrangements each week and working 30 to 35 hours per week in the restaurant, which she described as a temporary situation. The profits from her flower sales were minimal. Also, she was unaware whether the restaurant was earning a profit.

(8) Ms. Acosta retains the ability to earn between \$280 and \$300 per week, plus fringe benefits comparable in value to those that she received from Riverside Hospital. That finding is based upon the testimony of human resources expert Jerry Hardin.

(9) As a result of the January 1996 accident, Ms. Acosta has a 6 percent whole body functional impairment.

Conclusions of Law

(1) Because hers is an "unscheduled" injury, Ms. Acosta's permanent partial general disability is determined by K.S.A. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk¹ and Copeland.² In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A.

¹ Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

² Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the injury.

(2) The Appeals Board concludes that Ms. Acosta failed to prove that she has made a good faith effort to find appropriate employment. Between her March 1997 release to return to work and her testimony in May 1998, Ms. Acosta had contacted only six potential employers. Considering the entire record, the Appeals Board finds that Ms. Acosta has expended limited effort in seeking employment.

(3) Although it is unfortunate that Riverside Hospital did not permit Ms. Acosta to return to its employment, it has no duty to do so. Likewise, Riverside is not required to utilize the vocational rehabilitation services provided in the Act to assist Ms. Acosta to find employment. The Court in Copeland placed the burden solely and squarely on the injured worker's shoulders to find employment.

(4) Pursuant to Copeland, the Appeals Board concludes a post-injury wage must be imputed for the wage loss prong of the permanent partial general disability formula. Based upon the findings above, Ms. Acosta retains the ability to earn a wage that is comparable to the wage that she was earning at the time of her accident. Because the imputed wage is at least 90% of the average weekly wage that Ms. Acosta was earning on the date of accident, her benefits are limited to the 6 percent whole body functional impairment rating.

AWARD

WHEREFORE, the Appeals Board modifies the Award dated June 23, 1998, to adjust the average weekly wage to comply with the parties' stipulations and to reduce the permanent partial general disability from 70% to 6%.

Anita Acosta is granted compensation from Riverside Hospital and its insurance carrier for a January 10, 1996, accident and a resulting 6% permanent partial general disability. Based upon a \$298.21 weekly wage, Ms. Acosta is entitled to receive 41.29 weeks of temporary total disability and 23.32 weeks of permanent partial general disability benefits at \$198.82 per week, for a total award of \$12,845.76, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts the remaining orders to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Roth, Wichita, KS
Scott J. Mann, Hutchinson, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director